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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
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10 MARIO WILLIAMS, ) No. CV 18-6460 DDP (FFM)  
11 Petitioner, )  
12 v. ) ORDER SUMMARILY DISMISSING  
13 RON DAVIS, WARDEN, ) PETITION FOR WRIT OF HABEAS  
14 Respondent. ) CORPUS FOR LACK OF SUBJECT  
15 ) MATTER JURISDICTION;  
16 ) REFERRING THE PETITION TO THE  
17 ) U.S. COURT OF APPEALS PURSUANT  
18 ) TO NINTH CIRCUIT RULE 22-3(A);  
19 ) DENYING A CERTIFICATE OF  
20 ) APPEALABILITY

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24 **DISMISSAL OF HABEAS PETITION WITHOUT PREJUDICE**

25 On or about July 18, 2018, petitioner Mario Williams (“Petitioner”)  
26 constructively filed a Petition for Writ of Habeas Corpus by a Person in State  
27 Custody (“Petition”).<sup>1</sup> Petitioner challenges a conviction and sentence imposed  
28 by the California Superior Court for the County of Los Angeles in 2007.

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<sup>1</sup> A pro se prisoner’s relevant filings may be construed as filed on the date they were submitted to prison authorities for mailing, under the prison “mailbox rule” of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379 (1988). In this case, Petitioner attached to the Petition a Declaration of Service by Mail By Person in State Custody. The Declaration states that Petitioner submitted the Petition to prison authorities for mailing on July 18, 2018.

1       The Court takes judicial notice of its files with respect to a prior habeas  
2 petition (the “Prior Petition”) Petitioner filed in this Court on September 14,  
3 2009, Case No. CV 09-6645 DDP (FMO). The Court notes that the Prior  
4 Petition was directed to the same conviction and/or sentence sustained in Los  
5 Angeles County Superior Court in 2007. On December 14, 2012, Judgment was  
6 entered in Case No. CV 09-6645 DDP (FMO) denying the Prior Petition on the  
7 merits and dismissing the action with prejudice.

8       The Petition now pending is governed by the provisions of the  
9 Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110  
10 Stat. 1214) (“the Act”) which became effective April 24, 1996. Section 106 of  
11 the Act amended 28 U.S.C. § 2244(b) to read, in pertinent part, as follows:

12       (1) A claim presented in a second or successive habeas corpus  
13 application under section 2254 that was presented in a prior  
14 application shall be dismissed.

15       (2) A claim presented in a second or successive habeas corpus  
16 application under section 2254 that was not presented in a prior  
17 application shall be dismissed unless --

18           (A) the applicant shows that the claim relies on a new  
19 rule of constitutional law, made retroactive to cases on  
20 collateral review by the Supreme Court, that was  
21 previously unavailable; or

22           (B)(I) the factual predicate for the claim could not have  
23 been discovered previously through the exercise of due  
24 diligence; and

25           (ii) the facts underlying the claim, if proven and  
26 viewed in light of the evidence as a whole, would be  
27 sufficient to establish by clear and convincing evidence  
28 that, but for constitutional error, no reasonable

1 factfinder would have found the applicant guilty of the  
2 underlying offense.

3 (3)(A) Before a second or successive application permitted by this  
4 section is filed in the district court, the applicant shall move in the  
5 appropriate court of appeals for an order authorizing the district  
6 court to consider the application.

7 Therefore, because the Petition now pending challenges the same  
8 conviction as Petitioner's Prior Petition, it constitutes a second and/or successive  
9 petition within the meaning of 28 U.S.C. § 2244(b). To the extent Petitioner  
10 seeks to pursue the same claims he previously asserted, the Petition is barred by  
11 the provisions of 28 U.S.C. § 2244(b)(1). To the extent Petitioner seeks to pursue  
12 claims not previously asserted, it was incumbent on him under § 2244(b)(3)(A) to  
13 secure an order from the Ninth Circuit authorizing the District Court to consider  
14 the Petition, prior to his filing of it in this Court. Petitioner's failure to secure  
15 such an order from the Ninth Circuit deprives the Court of subject matter  
16 jurisdiction.

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18 **"REFERRAL" OF HABEAS CORPUS PETITION TO NINTH CIRCUIT**

19 Ninth Circuit Rule 22-3(a) states, in pertinent part, that "[i]f a second or  
20 successive petition or motion, or an application for authorization to file such a  
21 petition or motion, is mistakenly submitted to the district court, the district court  
22 shall refer it to the court of appeals."

23 Therefore, to the extent the Petition was "mistakenly submitted" to this  
24 Court, the Petition must be referred to the court of appeals. However, it is unclear  
25 whether the district court may both "refer" the Petition to the Ninth Circuit and, at  
26 the same time, dismiss the Petition. After reviewing numerous district court cases

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1 in this circuit, this Court concludes that simultaneous referral and dismissal is  
2 appropriate. *See Cielto v. Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23,  
3 2014).

#### 4 5 **DENIAL OF CERTIFICATE OF APPEALABILITY**

6 Rule 11(a) of the Rules Governing § 2254 Actions provides:

7 (a) Certificate of Appealability. The district court must  
8 issue or deny a certificate of appealability when it enters  
9 a final order adverse to the applicant. Before entering  
10 the final order, the court may direct the parties to submit  
11 arguments on whether a certificate should issue. If the  
12 court issues a certificate, the court must state the  
13 specific issue or issues that satisfy the showing required  
14 by 28 U.S.C. § 2253(c)(2). If the court denies a  
15 certificate, the parties may not appeal the denial but may  
16 seek a certificate from the court of appeals under  
17 Federal Rule of Appellate Procedure 22. A motion to  
18 reconsider a denial does not extend the time to appeal.

19 Here, given the Court’s ruling on settled legal issues, the Court does not  
20 require any arguments from the parties on whether a certificate of appealability  
21 (“COA”) should issue.

22 Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant has  
23 made a substantial showing of the denial of a constitutional right.” Here, the  
24 Court dismissed the petition on the ground that it was a second or successive  
25 petition. Thus, the Court’s determination of whether a COA should issue is  
26 governed by the Supreme Court’s decision in *Slack v. McDaniel*, 529 U.S. 473,  
27 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), where the Supreme Court held that,  
28 “[w]hen the district court denies a habeas petition on procedural grounds without

1 reaching the prisoner’s underlying constitutional claim, a COA should issue when  
2 the prisoner shows, at least, that jurists of reason would find it debatable whether  
3 the petition states a valid claim of the denial of a constitutional right and that  
4 jurists of reason would find it debatable whether the district court was correct in  
5 its procedural ruling.” 529 U.S. at 484. As the Supreme Court further explained:

6       Section 2253 mandates that both showings be made before the court  
7       of appeals may entertain the appeal. Each component of the §  
8       2253(c) showing is part of a threshold inquiry, and a court may find  
9       that it can dispose of the application in a fair and prompt manner if it  
10      proceeds first to resolve the issue whose answer is more apparent  
11      from the record and arguments.

12 529 U.S. at 485.

13       Here, the Court finds that its ruling is not one in which “jurists of reason  
14 would find it debatable whether the district court was correct in its procedural  
15 ruling” that the Court has no jurisdiction over the Petition.

### 16 17 **ORDER**

18       Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the habeas Petition  
19 to the U.S. Court of Appeals for the Ninth Circuit for consideration as an  
20 application for leave to file a second-or-successive habeas petition. The Clerk of  
21 Court shall send a copy of the habeas Petition and a copy of this Order to the  
22 Clerk of the U.S. Court of Appeals for the Ninth Circuit.

23       The Clerk of Court shall provide petitioner with a form recommended by  
24 the Ninth Circuit for filing an Application for Leave to File Second or Successive  
25 Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

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This action is dismissed without prejudice for lack of subject-matter jurisdiction pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

LET JUDGMENT BE ENTERED ACCORDINGLY.

A certificate of appealability is denied.

DATED: 9/13/18

Don Dreyerson

DEAN D. PREGERSON  
United States District Judge

Presented by:

/S/ FREDERICK F. MUMM  
FREDERICK F. MUMM  
United States Magistrate Judge